(3)

No. 88-72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PINNEY DOCK & TRANSPORT CO.,
Petitioner,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

LITTON INDUSTRIES, INC., *et al.*,
Petitioners,

v.

NORFOLK & WESTERN RAILWAY CO., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

1. *Introduction*

These cases involve an antitrust challenge to railroad rates that were set over thirty years ago. The rates in question were the product of a legal system that displaced the antitrust norm by promoting, immunizing and

regulating agreements among competitors. This legal system, which below justified dismissal of Petitioners' rate claims on alternative grounds, was largely dismantled by Congress eight years ago, and the collective rate setting disputed here is ancient history.

The Petitioners are Pinney Dock and Litton, respectively a dock company and a shipbuilding company. Each alleges that the Respondent railroads committed antitrust violations in the iron ore transportation industry dating back to the mid-1950's.[1] In particular, Petitioners' complaints describe two categories of unlawful acts: rate actions arising out of Respondents' participation in a collective ratemaking organization approved and administered by the Interstate Commerce Commission; and, to a lesser extent, non-rate actions. With respect to iron ore rates, Petitioners allege that the Respondent railroads (1) charged inland (line-haul) rail rates from private docks that were too high, and (2) set handling charges for self-unloader vessels unloaded at railroad docks that also were too high. Pet. App. at 8a. As for non-rate allegations, Petitioners complain about refusals to sell or lease land suitable for dock operations and unspecified "harassment" of trucking. Pet. at 3-4. According to Petitioners, "but for" these actions, industries would have been transformed: steel companies in Ohio and Pennsylvania would have shifted their iron ore transportation from bulker vessels, railroad docks and rail service to self-unloading vessels (some of which would have been built by Litton), private docks (such as Pinney) and trucking. Pet. App. at 10a-11a.

It is undisputed that throughout the twenty-five year period at issue here Respondents' rail rates and dock handling charges were subject to the plenary authority of the ICC under the standards of the Interstate Commerce

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[1] The identity of the Respondents and other information required by Rule 28.1 are set forth in Appendix A.

Act ("ICA"). It is also undisputed that the Respondents were parties to an ICC-approved rate bureau agreement and that rates made in accordance with the agreement were expressly "relieved from the operation of the antitrust laws" by statute. *See id.* at 4a-7a.

2. *The Decision Below*

The Court of Appeals dismissed Petitioners' "rate-related" claims on three independent grounds, and further held that the statute of limitations barred all federal claims that occurred more than four years before the actions were commenced. Pet. App. at 75a-76a. The court reversed the district court's orders on these issues pursuant to 28 U.S.C. § 1292(b).[2]

The Court of Appeals held that Petitioners' rate claims were barred by the express antitrust immunity Congress provided for collective ratemaking in the Reed-Bulwinkle Act of 1948. The court based its decision on the statutory language, which exempts the "making" and the "carrying out" of an ICC-approved rate bureau agreement. Pet. App. at 23a-24a. It also relied on the fact that Respondents were parties to such an agreement and that Petitioners had waived any claim that Respondents did not comply with the terms of the ICC-approved rate bureau agreement. *Id.* at 7a, 28a. Consequently, the legal issue on appeal was whether, as Petitioners argued, the court should create an exception to the express immunity for collective ratemaking which, though squarely within the statutory protection, allegedly was accompanied by "anti-competitive intent." The Court of Appeals rejected this argument on the grounds that it was not consistent with the plain language of the statute and

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[2] The district court previously had denied Respondents' motions for summary judgment, but certified its orders for interlocutory appeal as involving legal issues "as to which there is substantial ground for difference of opinion." The Court of Appeals agreed to review the orders. Pet. App. at 243a, 255a, 315a, 317a.

that a judicially-implied exception based on anti-competitive motive would be unworkable since the process of joint ratemaking endorsed by Congress was itself "undeniably anti-competitive." *Id.* at 24a.

The Court of Appeals also held that, wholly apart from the express statutory immunity, the *Keogh* doctrine provided an alternative basis for striking the rate claims. *Id.* at 16a-22a. Closely following the rationale of this Court's opinion in *Keogh*, the court barred Petitioners' damages claims "insofar as these claims are based either on defendants' own handling charges or on the line-haul rate that was applied from Pinney Dock." *Id.* at 16a-17a, 21a. The court expressly held, however, that *Keogh* did not bar Petitioners' non-rate claims, including the alleged refusal to sell or lease land and the alleged harassment. *Id.* at 21a-22a, 75a-76a.

As a third independent basis for dismissing certain of Petitioners' rate claims, the Court of Appeals applied the principles of antitrust standing established in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). After carefully balancing the factors which supported and negated Petitioners' standing, focusing particularly on the speculative and attenuated chain of causation underlying Petitioners' theories, the court held that "the *AGC* factors clearly favor defendants." Pet. App. at 36a. Accordingly, as a matter of law based on the complaint allegations, the court dismissed the subject rate claims on this alternative ground.[3]

The final section of the Court of Appeals' opinion at issue here addressed the question whether Petitioners had raised a triable issue with respect to their assertion that the four-year limitations period should be tolled on

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[3] Specifically, the court held that "all rate-related claims except for Pinney's claim that defendants did not grant it a commodity line-haul rate [which Respondents did not challenge] are subject to dismissal on the alternative basis of standing." Pet. App. at 76a.

account of "fraudulent concealment."[4] The court carefully reviewed the fraudulent concealment standards that Petitioners were required to satisfy.[5] After deciding the legal standard for "actual concealment," the court concluded that there might be a genuine factual dispute on this issue. Pet. App. at 64a. However, with respect to Petitioners' separate burden of establishing both lack of knowledge of, and due diligence in pursuing, their claims, the court held that there was no escaping the fact that Petitioners had gained sufficient knowledge of the elements of their claims well more than four years before their complaints were filed:

> [T]he time eventually arrived when the "alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit."

Id. Indeed, as to Petitioner Pinney, the court found that fully twelve years prior to filing its complaint, it had been advised by counsel to file an antitrust suit "to fight this combination," but did not pursue the matter then because it concluded it would be better to wait until there was more self-unloader capacity. *Id.* at 64a-65a. Having found no genuine issue of material fact on these essential elements of the fraudulent concealment doctrine, the court held that the statute of limitations could not be tolled, and that Petitioners could only pursue federal claims arising within the four-year period. *Id.* at 76a.

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[4] The Court of Appeals also reversed the district court on the issue of preemption of state law, holding that the federal four-year limitations period for antitrust actions does not preempt the application of the no-limitation provision in Ohio's state antitrust statute. Pet. App. at 71a-75a.

[5] It is well-established, and not in dispute here, that an antitrust plaintiff seeking to avoid the four-year statute of limitations has the burden of proving three elements: (1) actual concealment of the unlawful conduct by defendants; (2) lack of knowledge of the underlying conduct on the part of the plaintiff; and (3) due diligence in seeking to discover its claim. Pet. App. at 37a.

REASONS FOR DENYING THE WRIT

To change the result below, Petitioners necessarily have sought review (and will seek reversal) on at least four issues. Pet. at i, Questions 1, 2, 3(a) and 3(b). The Court of Appeals, as explained above, found that three separate and distinct legal grounds required dismissal of Petitioners' rate claims. These alternative holdings are addressed by Petitioners in Questions 1, 2 and 3(a).[6] Thus, to reinstate the essential elements of Petitioners' Sherman Act claim, this Court would have to grant *certiorari* (and ultimately reverse) on all of the questions presented.

Petitioners' effort to gain review in this Court begins with two mischaracterizations. Petitioners contend that this case presents "important and recurring questions concerning immunity," without mentioning that the collective ratemaking by railroads to which the statutory immunity applied has been a dead letter since shortly after the 1980 railroad deregulation legislation. Pet. at 10. Petitioners also vastly overstate the holding of the Court of Appeals as having "conjured up" a broad immunity, which "effectively nullified the federal antitrust laws," without noting that it was Congress, not the court below, that created the express antitrust immunity for railroad rate agreements during the time period at issue here, and that the decision below applies this immunity *only* to rate actions clearly within the letter of the statutory provision. *Id.* at 10, 12.

The Court of Appeals did not depart from legal precedent, but instead properly applied the governing statutory provisions and decisions of this Court. It most as-

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[6] In their Question 3, Petitioners blend issues relating to both the statute of limitations and standing holdings below. The standing element pertains primarily to the *rate* claims, while the statute of limitations ruling permits Petitioners to pursue only those federal claims arising within four years of institution of suit.

suredly did not, as Petitioners repeatedly imply, extend its immunity or *Keogh* holdings beyond the rate claims to which Congress and this Court have declared them applicable. *Id.* On the contrary, Petitioners' non-rate-based theories were preserved to the extent such claims were not otherwise barred by the Clayton Act's four-year statute of limitations or standing principles. The questions presented in the Petition do not warrant this Court's attention, either individually or collectively, and the writ should not issue.

I. Statutory Immunity (Question 1)

Petitioners say that the question presented is

> Whether, as the court of appeals held (in conflict with the District of Columbia Circuit's decision in the criminal case against respondents for the same conduct), the participants in a conspiracy to eliminate direct competitors are immune from antitrust accountability in the federal courts *because* they are regulated by a federal administrative agency.

Pet. at i (emphasis added). This question is not presented here for the simple reason that it is based on a totally inaccurate portrayal of the Court of Appeals' decision. Deferring for the moment the supposed conflict in the circuits, it is important to make clear that the immunity applied by the Court of Appeals is not, as Petitioners suggest, derived by implication from some amorphous penumbra of federal regulation. Rather, the court's decision is based solely on an explicit statutory provision by which Congress conferred an express antitrust immunity upon railroads for collective ratemaking. Pet. App. at 22a-28a.

a. The Court of Appeals relied, not merely on the fact of regulation, but on the plain language of the Reed-Bulwinkle Act. This immunity statute provided that the parties to an ICC-approved rate bureau agreement are

> relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.[7]

Properly focusing on the statutory language, the court recognized that the rate activity Petitioners challenge was within the statutory protection for "carrying out" the rate bureau agreement. Pet. App. at 24a-25a. The purpose of the ICC-approved agreement, the court noted, was "the establishing of rates," and the ICC contemplated "concerted activity" when it approved the ratemaking agreement. *Id.* The court's decision simply acknowledges that, by jointly deciding upon rates and then charging those rates, Respondents were engaging in conduct to "carry out" the agreement.

The Court of Appeals further held that the challenged rate decisions were made "in conformity with" the agreement approved by the ICC. Indeed, because Petitioners waived any claim of noncompliance with the Commission's authorized ratemaking procedures, this holding was unavoidable. Pet. App. at 28a.[8] While Petitioners now appear to be uncomfortable with that waiver and try to escape from it, Pet. at 13 n.10, the waiver of all claims of procedural noncompliance is unambiguous in Petitioners' pleadings before the district court. They repeatedly represented that they "will not claim that defendants incurred antitrust liability by failing to adhere to formal

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[7] Ch. 491, 62 Stat. 472-73 (1948), codified at 49 U.S.C. § 5b(9) (1976), recodified, as amended, at 49 U.S.C. § 10706 (1982); Pet. App. 324a-326a.

[8] The Court of Appeals recognized that Petitioners' waiver of the procedural compliance issue was made to avoid an otherwise necessary referral (under the primary jurisdiction doctrine) to the ICC of questions involving interpretation of the Commission's 5a agreement and orders. Pet. App. 28a.

practices or procedures mandated by their 5a agreement or by the ICC." C.A. App. 590, 597-98. This case therefore does not present any question concerning the antitrust implications of failing to follow the rate bureau procedures upon which the statutory immunity is based.[9]

b. The Petition seeks to avoid the plain language of the Reed-Bulwinkle immunity by suggesting that the Court of Appeals broadened the immunity beyond the bounds established by Congress. Pet. at 12.

(i) To the contrary, the decision below limited its immunity holding to the "rate-related" claims; it did not confer a general antitrust immunity on the railroads, or extend this holding to non-rate activities. Pet. App. at 28a, 75a.

(ii) To the extent Petitioners argue that the immunity should not be given effect as to covered ratemaking because Petitioners have also alleged that Respondents engaged in other, non-rate conduct which was *not* subject to the express immunity, their argument finds no support in either the language of the statute or its purposes. The Court of Appeals simply recognized that the conduct covered by the express statutory immunity is not deprived of that immunity because of other conduct alleged by Petitioners. Where conduct is immune from antitrust scrutiny, and even where it is "intended to eliminate competition," that conduct remains immune "either standing alone or as part of a broader scheme itself violative of the Sherman Act." *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). On the other hand, the decision below properly excluded non-rate claims from the immunity holding, because they are not covered by the statutory protection.

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[9] Petitioners' unseemly attempt to create a belated dispute over the scope of the waiver is not worthy of this Court's attention.

(iii) Petitioners' further contention regarding the "right of independent action," Pet. at 12, is unavailing not simply because Petitioners never argued it to the Court of Appeals, but because it is yet another issue of compliance with the rate bureau agreement that would require the referral to the ICC which Petitioners avoided with their waiver.

c. As to the conflict in the circuits that Petitioners advertise in their question presented, it is entirely illusory. Pet. at i, 12-13. The decision on which Petitioners rely, *United States v. Bessemer & Lake Erie Railroad*, 717 F.2d 593 (D.C. Cir. 1983), was on appeal from a *nolo contendere* plea in a criminal case, and, as such, the court had to accept all indictment allegations as true. *Id.* at 598. In that posture, the court ruled that the express immunity did not apply because the indictment made allegations both of ratemaking that did not conform to the ICC-approved rate bureau procedures and of non-rate conduct, which by definition was subject matter "not within the scope of a Section 5a agreement." *Id.* at 601-602. Thus, the *Bessemer* case stands only for the unremarkable proposition that the immunity is unavailable for conduct outside the statutory provision, a holding that is entirely consistent with the Sixth Circuit decision below.[10]

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[10] Petitioners apparently have abandoned their central argument below that, based on *Atchison, Topeka & S.F. Ry. Co. v. Aircoach Transp. Ass'n*, 253 F.2d 877 (D.C. Cir. 1958), ratemaking explicitly protected by Congress somehow loses its immunity if it is undertaken with an "unlawful purpose." *See* Pet. at 13 n.9. The Court of Appeals properly rejected this argument on the grounds that no such motive exception appeared in the statute, and that to imply one would defeat the legislative intent to immunize collective ratemaking that was "undeniably anti-competitive." Pet. App. at 24a. Moreover, virtually all of the cases cited by Petitioners on this issue (Pet. at 13 n.9) were decided prior to this Court's decision in *United Mine Workers v. Pennington*, which held that immune activity cannot violate the antitrust laws, "either standing alone or

d. Petitioners' final contention on the immunity issue is difficult to discern, but appears to be that, despite the plain language of the statute, Congress really meant to exclude from the Reed-Bulwinkle immunity either all "conspiracies," or at least a "conspiracy to eliminate a competitor." Pet. at i, 13-15. Their argument proves too much, however, for every rate decision collectively made by competing railroads could be characterized as a "conspiracy" within the meaning of the Sherman Act, and, as the Court of Appeals recognized, the scheme of collective ratemaking Congress intended to promote was "undeniably anti-competitive." Pet. App. at 24a. Moreover, Petitioners' view on this point is refuted flatly by this Court's statement in *Square D* that the Reed-Bulwinkle Act "created an *absolute immunity* from the antitrust laws for approved collective ratemaking activities." *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 419 (1986) (emphasis added). The Court of Appeals therefore correctly declined Petitioners' invitation to rewrite the statute in a manner inconsistent with the clear legislative purpose.[11]

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as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670. Indeed, *Aircoach* relied on the district court decision in *Noerr*, a decision that was ultimately overturned by this Court. 253 F.2d at 887. *See Noerr Motor Freight, Inc. v. Eastern R.R. Pres. Conf.*, 155 F.Supp. 768 (E.D. Pa. 1957), *aff'd*, 273 F.2d 218 (3d Cir. 1959), *rev'd*, 365 U.S. 127 (1961). It is not surprising therefore that, contrary to Petitioners' assertion, the court in *Bessemer* pointedly declined to rest its decision upon *Aircoach*, but instead evaluated the allegations of the indictment under the language of the statute. 717 F.2d at 600.

[11] Petitioners' reliance on selected excerpts from the Reed-Bulwinkle legislative history for a "conspiracy" exception is misplaced. Pet. at 14. All the House report says is that the Act would not affect the outcome of *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439 (1945), which predated passage of the Act. The smattering of comments from the floor debate indicate only that certain legislators did not intend to immunize certain kinds of conspiracies, such as ones outside the rate bureau or involving non-rate conduct. There is nothing in any of this history inconsistent with the judg-

e. By the standards that this Court employs to determine the importance of an issue for *certiorari*, Petitioners' statutory immunity question is decidedly unimportant in either a practical or a jurisprudential sense. The proper scope and construction of the Reed-Bulwinkle immunity is now largely beside the point. With the passage of the Staggers Rail Act of 1980, Congress not only deregulated many aspects of railroad rates, but substantially restricted antitrust immunity.[12] As a result, the railroads' rate bureau ceased operations many years ago. Thus, not only was the Court of Appeals correct, but it is virtually inconceivable that the issue that Petitioners ask this Court to review will arise ever again.

II. *Keogh* (Question 2)

Petitioners' challenge to the Court of Appeals' alternative holding, which follows this Court's decision in *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922), simply ignores the rationale of that case. The decision below rejected Petitioners' argument that the application of *Keogh* should depend on who the plaintiff is in a given case (*e.g.*, shipper vs. competitor), because such a distinction would be inconsistent with *Keogh*'s rationale. Pet. App. at 19a-20a. The court recognized that *Keogh* focuses on rates and the nature of the antitrust claim being made, not the identity of the party

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ment below that Respondents' ratemaking, carried out "in conformity with" their ICC-approved rate bureau agreement, was protected by the statute. In any event, floor statements, even by a sponsor, "have never been regarded as sufficiently compelling to justify a deviation from the plain language of a statute." *United States v. Oregon*, 366 U.S. 643, 648 (1961). *See also Garcia v. United States*, 469 U.S. 70, 76-79 (1984) (giving effect to statutory language despite an inconsistent statement by the floor manager).

[12] Pub. L. No. 96-448, 94 Stat. 1895 (1980). Neither the Staggers Act, nor the earlier Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976), was claimed to be applicable to the facts of the instant case. Pet. App. at 7a n.8.

making it. If the plaintiff claims that something other than the filed rate should have been the rate that was actually charged, then the claim is inconsistent with *Keogh*'s holding regarding the legal significance of filed rates within the framework of the Interstate Commerce Act and the antitrust laws.

a. In *Keogh*, this Court held that, having vested the Interstate Commerce Commission with control and authority over railroad rates, Congress did not intend a plaintiff to use the antitrust laws to attack existing rates as unlawful and thereby obtain the benefit of a different rate than the rate actually filed and authorized under the ICA. Thus, *Keogh* concluded that an antitrust claim could not be maintained where rates were "the instrument by which [the plaintiff] is alleged to have been damaged." 260 U.S. at 161. Rather, Congress intended the lawfulness of regulated rates to be the sole province of the ICA:

> A rate is not necessarily illegal because it is the result of a conspiracy in restraint of trade in violation of the Anti-Trust Act. What rates are legal is determined by the Act to Regulate Commerce.

Id. at 162.

This Court reasoned that "[i]njury implies violation of a legal right," *id.* at 163, but the law (the Interstate Commerce Act) provides that, once a rate is filed with the ICC and published in the tariff, a carrier may not charge anything else.[13] Unless a filed rate is suspended or set aside by the Commission, no one may complain that its legal rights were violated when all that was paid,

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[13] "[N]or shall any carrier charge . . . or receive a greater or less or different compensation for [the] transportation . . . or service . . . than the rates, fares, or charges which are specified in the tariff filed and in effect at the time." Hepburn Act of 1906, ch. 3591, § 2, 34 Stat. 584, 586 (1906), codified at 49 U.S.C. § 6(7) (1976), recodified at 49 U.S.C. § 10761(a) (1982).

or charged, was the rate in the filed tariff. *Id.* Given the statutory framework of the Interstate Commerce Act, a jury empanelled to hear an antitrust case cannot be allowed as a predicate for condemning existing rates to speculate about what hypothetical rates might otherwise have been filed by the carriers and authorized under the ICA. To permit such speculation about rates that might have been permissible under the ICA would undermine the Commission's ability to preserve a uniform and non-discriminatory rate structure, as Congress intended. *Id.* at 163-64.[14]

Indeed, at the practical core of *Keogh* is the understanding that Congress intended anyone who believes that rates are too high or otherwise unlawful to take the complaint about those rates to the ICC, which has exclusive authority to ensure that rates are both reasonable and non-discriminatory. The shipper in *Keogh* had the statutory right to take any grievances it had about rates to the Interstate Commerce Commission, which entertained such complaints. Here, the Court of Appeals read the statute and quite properly found that competitors had exactly the same access to the Commission to complain about rates as did the shipper in *Keogh*. Pet. App. at 20a.[15]

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[14] As a separate element of its reasoning in that case, the *Keogh* Court also noted that an award of damages to one shipper might create discrimination prohibited by the ICA. 260 U.S. at 163. The Court of Appeals acknowledged that this aspect of the rationale loses force in a competitor context, but correctly held that the remaining three prongs of the *Keogh* rationale were fully applicable. Pet. App. at 21a.

[15] Congress expressly provided that "*any* person" could file a complaint at the ICC, and could address "*anything* done or omitted to be done" by a railroad in violation of the ICA. Interstate Commerce Act of 1887, ch. 104, Pt. I, § 13, 24 Stat. 379, 383-84 (1887), codified as amended at 49 U.S.C. § 13(1) (1976), recodified at 49 U.S.C. § 11701(b) (1982) (emphasis added). Recognizing the breadth of its jurisdiction, the ICC has held that "a complainant,

In short, while it is true that the plaintiff in *Keogh* was a shipper, not a competitor, the rationale of the *Keogh* decision forces Petitioners to argue for the proverbial distinction without a difference. Indeed, this Court's prior decisions properly attribute no significance under the ICA to the identity of the plaintiff. *Terminal Warehouse Co. v. Pennsylvania Railroad Co.*, 297 U.S. 500, 514-15 (1936) (relying in part on *Keogh* to hold that a private warehouse could not pursue antitrust damages based on preferential rail rates granted to a competing warehouse); *Arrow Transportation Co. v. Southern Railway Co.*, 372 U.S. 658 (1963) (holding without reference to *Keogh* that a barge line competing with a railroad cannot collaterally attack an ICC-regulated rate in a judicial proceeding).[16]

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without regard to the nature of its interests, has a right to complain of anything done or attempted to be done in contravention of the provisions of the act, and to have its complaint considered on its merits." *Shaw Warehouse Co. v. Southern Railway*, 308 I.C.C. 609, 612 (1959). The ICC has regularly heard complaints of parties claiming to be competitors, including private docks. *See, e.g., U.S. Phosphoric Products Corp. v. Atlantic Coast Line Railroad*, 206 I.C.C. 411 (1935) (ICC considered and rejected complaint of private dock operator that railroad violated ICA by failing to offer competitive service). In this regard, the Court of Appeals was well aware that Pinney Dock had carefully considered, threatened and then rejected making a formal complaint to the ICC about the rates disputed here. Pet. App. at 64a-65a.

[16] Petitioners' challenge to the Court of Appeals' reliance on *Georgia* as a case applying *Keogh* where the plaintiff was both a shipper and a competitor misses the mark. They argue that the State's amended complaint reveals that Georgia was seeking damages only as a shipper, and not in its role as proprietor of a competing railroad. Pet. at 16-17. This Court's opinion states, however, that "Georgia sues as a proprietor to *redress* wrongs suffered by it as the owner of a railroad and as the owner and operator of various public institutions." 324 U.S. at 447 (emphasis added). The notion that the Court would have applied *Keogh* to dismiss Georgia's shipper damage claims, but would not have done so for damage claims lodged by Georgia as a competitor against the very same rates is

Petitioners argue for a limit on *Keogh* based on their characterization of *Square D* as a begrudging reaffirmation, resting more on *stare decisis* (so Petitioners assert) than on an embrace of its rationale. Pet. at 17. While the *Square D* opinion focuses on *stare decisis*, as one would expect in a case involving a request to overrule a long-standing decision, in fact this Court recognized the breadth of the *Keogh* doctrine and its historic significance. Thus, the Court both rejected an attempt to limit *Keogh* to its facts, noting that the decision does not admit of such a "narrow reading," 476 U.S. at 417 n.19, and confirmed *Keogh*'s importance as an "*essential element* of the settled legal context" where the antitrust and interstate commerce laws intersect. *Id.* at 423 (emphasis added). As the Court of Appeals properly held, so long as *Keogh* is good law (and it will be good law unless Congress acts to overturn it), it simply cannot be stripped of its rationale and artificially confined to its precise facts.

b. To attract this Court's attention to *Keogh*, Petitioners once again mistakenly claim a conflict in the circuits. The three cases upon which they principally rely did not involve the Interstate Commerce Act at all, but related to entirely different regulatory schemes with different provisions and different legislative intent. *See Essential Communications Systems, Inc. v. AT&T*, 610 F.2d 1114, 1120 (3d Cir. 1970) ("The [Communications] Act does not impose . . . the kind of comprehensive regulation which, after 1920, the ICC exercised over the rail-

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unsupported in the decision and implausible in light of *Keogh*'s broad rationale and this Court's refusal, over forty years after *Georgia* and sixty years after *Keogh*, to limit *Keogh* strictly to its facts. *Square D*, 476 U.S. at 417 n.19. But, regardless of how one interprets the *Georgia* pleadings, it is clear that there is ample precedent in this Court for barring a competitor from using the courts to attack ICC-regulated rates, which is precisely what the court below did.

roads); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983) (Communications Act); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981) (Federal Power Act).[17] It is one thing to apply *Keogh* according to its terms and rationale to cases subject to the same regulatory scheme involved in *Keogh*—which is what the Court of Appeals did here. However, it would be quite another thing, and quite improper under *Square D*, to seek to undermine *Keogh*'s rationale on the bases of dissimilar (and weaker) regulatory schemes, as Petitioners invite this Court to do. Pet. at 15-16; *Square D*, 476 U.S. at 422-23 n.29 (rejecting the proposition that a decision in the context of maritime regulation undermines *Keogh*, because the Federal Maritime Commission has "far more limited authority over rates than the

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[17] Petitioners' cases are distinguishable in other important respects. First, in *Essential Communications*, the "instrument" of injury and damages was not a rate, but a requirement that customers purchase a piece of equipment. 610 F.2d at 1116. Thus, unlike the instant cases, the claim did not require the court to make any forbidden rate determination. Precisely the same equipment purchase requirement was challenged in *Litton*, where the Second Circuit held "this case can be distinguished from *Keogh* . . . because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the PCA requirement itself was reasonable." 700 F.2d at 820. Second, in *Essential Communications*, the FCC had expressly "suspended its judgment" on the propriety of the tariff provision in issue "pending further study," 610 F.2d at 1124, and, in *City of Groton*, the agency had expressly disapproved the tariffs in question. 662 F.2d at 930-31. By contrast, the iron ore rates and rate relationships herein were prescribed by the ICC in 1916 (41 I.C.C. 181) and changed only by periodic ICC-approved rate increases. Third, unlike the instant cases, the Third Circuit in *Essential Communications* was confronted with an argument by the defendant that FCC regulation provided an implied blanket immunity from the antitrust laws. 610 F.2d at 1116-17. Indeed, when that Court of Appeals faced an ICA case, it held that a competitor plaintiff could not challenge filed rates under the antitrust laws, a result wholly consistent with *Keogh* and with the decision below. *Seatrain Lines, Inc. v. Pennsylvania R. Co.*, 207 F.2d 255, 260-61 (3d Cir. 1953).

Interstate Commerce Act gives the Interstate Commerce Commission").

In addition, Petitioners mention *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982). That case did involve the ICA, but the issue decided there had little to do with the question presented here. Rather, the focus was on allegations that, through meritless and sham litigation before the ICC, a freight forwarder had been prevented from filing a lower rate for two years. *Id.* at 1246-47. Because the instrument of antitrust injury was frivolous litigation, not an existing rate (as Petitioners here claim), the *Keogh* rationale was not implicated and the Ninth Circuit panel declined to bar the damage claim. *Id.* at 1266-67. The issue decided by that case simply had nothing to do with the identity of the antitrust plaintiff—the point that Petitioners press here.

c. In short, the *Keogh* issue, like the immunity question, is not worthy of *certiorari*. The decision below closely and properly followed this Court's *Keogh* decision, and no other circuit has reached a conflicting result in construing the ICA. Moreover, Congress, to which this Court in its *Square D* decision referred the *Keogh* issue, is currently considering legislation that would repeal the doctrine.[18] For all of these reasons, this Court need not review Question 2.

III. Appellate Jurisdiction (Questions 3(a) and (b))

In the third question presented, while Petitioners do not raise any issue of the substantive correctness of the Court of Appeals' rulings on standing and statute of limitations, they do complain that the court somehow treated these two legal issues incorrectly. Their principal complaint seems to involve the Court of Appeals' deter-

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[18] S. 443, 100th Cong., 1st Sess. and H.R. 941, 100th Cong., 1st Sess., 133 Cong. Rec. S1595 and H528 (daily ed. Feb. 3, 1987).

mination that the district court should have granted summary judgment to Respondents on the basis of the statute of limitations. Pet. at 20-25. Petitioners assert that the handling of the summary judgment issue was a "jurisdictional error." *Id.* at 20. It is difficult to see any "jurisdictional" dimension to this issue, but, however denominated, it is clear that the Court of Appeals handled the issue properly.

a. In the district court, Respondents moved for summary judgment dismissing all claims arising prior to the four-year limitations period. After the completion of extensive discovery, the district court held that a "self-concealing" conspiracy suffices to toll the statute of limitations; that even if affirmative acts of concealment were required, there had been such acts; and that there were genuine issues of fact that prevented it from finding that Petitioners' knowledge of the railroads' actions, and active consideration of suit many years before actually bringing suit, warranted the entry of summary judgment.[19] The district court denied Respondents' motion for summary judgment and certified its order to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). This was precisely what § 1292(b) requires:

> When a district judge, in making in a civil action an *order* not otherwise appealable under this section, shall be of the opinion that such *order involves* a controlling question of law . . . and that an immediate appeal from the *order* may materially advance the ultimate termination of the litigation, he shall so state in writing in such *order*. The Court of Appeals which would have jurisdiction of an ap-

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[19] Because statute of limitations/fraudulent concealment was an important threshold issue, the district court ordered discovery focused on knowledge and concealment issues, during which over 60 depositions were completed. Only after the conclusion of that discovery were summary judgment motions filed.

> peal . . . may . . . permit an appeal to be taken from such *order* . . . .

28 U.S.C. § 1292(b) (1982) (emphasis added).[20]

Petitioners challenge the Court of Appeals' "jurisdiction" on the contentions that "there was no 'controlling' legal issue on fraudulent concealment [and] the court of appeals' *de novo* resolution of that issue did nothing to 'materially advance the ultimate termination' of this protracted litigation." Pet. at 22. The answer to their first point, quite simply, is that the question whether the district court erred in declining to grant summary judgment *is* an issue of law. The question whether there are material factual issues of record that preclude the grant of summary judgment is also a question of law.[21] Indeed, beyond the obvious fact that these ultimate determinations are themselves legal issues, the district court's order "involved" (in the words of § 1292(b)) other legal issues, theretofore unsettled in the Sixth Circuit, concerning the kinds of actions that would amount to fraudulent concealment—issues that the Court of Appeals treated and clarified at length in its opinion, rejecting the district court's view that a self-concealing conspiracy

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[20] It is orders, not issues, that are certified under 28 U.S.C. § 1292(b). *United States v. Stanley*, 107 S. Ct. 3054, 3060 (1987) ("the Court of Appeals' jurisdiction is not confined to the precise question certified by the lower court (because the statute brings the 'order', not the question, before the court)"). *See also Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981) (under Section 1292(b), "all questions material to the order are properly before the court of appeals"). For this reason, Petitioners' repeated reference to the uncertainty over what particular questions had been certified (Pet. at 19-20) is of no consequence.

[21] As the Supreme Court has repeatedly recognized in recent decisions, Rule 56 requires the grant of summary judgment where there are no material factual disputes such that "the moving party is entitled to judgment as a matter of law." *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). *See also* C. Wright, *The Law of Federal Courts* 663-64 (1983).

is sufficient, but upholding the district court's finding that there was enough in the record to allow a jury to find that there was actual concealment. *See* Pet. App. at 39a-52a, 64a. In finding that Petitioners' clear knowledge of the railroads' actions, and in Pinney's case consideration of an antitrust action twelve years before actually commencing this suit, precluded tolling the statute under the separate knowledge and due diligence standards, the court was also deciding an issue of law that was unquestionably dispositive and that certainly was "involved" in the district court's "order."

Petitioners argue—remarkably, we think—that the court's disposition of the issue did not materially advance the case. They say that the disposition of

> fraudulent concealment did absolutely nothing to advance the litigation because the court simultaneously held that Ohio's Valentine Act, providing that "no statute of limitations" would bar an action under state law was not preempted . . . . Since the same facts form the basis for the state and federal causes of action, the court's foraging through the facts on fraudulent concealment was a pointless abuse of Section 1292(b) jurisdiction.

Pet. at 22. Not only is their position based on the surprising suggestion that eliminating a federal antitrust claim is insignificant, but it presupposes a prescience with respect to the outcome of the court's review that the interlocutory appeal statute does not expect or require. The determination of what questions "*may* materially advance the ultimate termination of the litigation" is made at the time the order is certified. The fact that one of several questions contained in certified orders ultimately does not shorten the trial as much as originally anticipated is irrelevant.[22]

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[22] Indeed, Petitioners' arguments in this respect are disingenuous. At the time these orders were certified for interlocutory review, the district court had held that the Valentine Act's perpetual limitations

Finally, Petitioners thoroughly misstate the Court of Appeals' holding in an effort to show that the Court of Appeals "usurped the role of the factfinder." Pet. at 23. Petitioners say:

> Although concluding that the record "may contain the seeds of support for the finding of the district judge that a factual question of actual concealment was presented"—a perception that, under the correct standard of review, requires affirmance—the court of appeals simply reached a different factual conclusion.

Pet. at 23. The Court of Appeals did no such thing. What the Court of Appeals found "seeds of support" for was the district judge's view that a triable issue existed as to one element of the fraudulent concealment doctrine—the issue of actual concealment by Respondents. But this was not the dispositive issue. Rather, the question of concealment was irrelevant in light of the fact that both Petitioners possessed sufficient information to have pursued their claims much sooner, and consciously elected to sit on their rights: As to Petitioner Pinney, the court held that "the time eventually arrived when 'the alleged conspiracy was no longer concealed and could have been discovered by due diligence well within the statutory period for bringing suit.'" Pet. App. at 64a. The court reached the same conclusion with respect to Litton: "[E]ven if the defendants might conceivably have misled Litton initially, *no reasonable person* in the position of Litton could have long relied on such impressions nor have been dissuaded from exercising due dili-

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period *was* preempted. In light of that ruling, the Court of Appeals' determination of the federal statute of limitations issue plainly would have furthered the litigation, for it would have precluded proof involving 21 years of the alleged 25-year conspiracy. The only reason that the Court of Appeals' determination on the federal statute of limitations issue was not dispositive of a potentially broader trial is that these very Petitioners sought and obtained interlocutory review and reversal of the Valentine Act issue that they now claim rendered the Court of Appeals' actions improper.

gence in investigating possible antitrust liability within the statutory period." *Id.* at 70a (emphasis added). Thus, the decision below was fully consistent with court's role on interlocutory appeal.[23]

In short, there was nothing extraordinary or unusual about the way in which the Court of Appeals addressed the statute of limitations issue.

b. The other part of Petitioners' question is their complaint that the Court of Appeals erred in reaching the issue of Litton's standing to bring its rate challenge, which had not been briefed or decided in the district court. Respondents had initially suggested in their appeal brief that it was proper for the appellate court to decide such an issue of law, and Litton had responded both to the procedural suggestion and on the merits. Having considered the legal issue regarding Petitioner Pinney's standing to sue, the Court of Appeals realized that the legal issue was, as a practical matter, fully dispositive of the issue of Litton's standing as well. Pet. App. at 32a-37a.

Indeed, there is no practical difference between the Court of Appeals simply holding that Litton's claim was barred on the analysis of standing principles found applicable to Pinney and remanding to the district court, which would then have had to dismiss those claims on the basis of the same analysis. Moreover, the same result—dismissal of Litton's rate claims—was independently required by statutory immunity and application of

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[23] Petitioners complain that the court somehow ignored the appellate "abuse of discretion" standard (Pet. at 23) even though, in reaching its conclusion, the court clearly referred to precisely that standard. Pet. App. at 52a-53a. Their further chiding of the decision below as holding that knowledge of unilateral action is sufficient to toll the statute, and their reliance on cases to the contrary (Pet. at 22 n.18), are irrelevant here, where the Court of Appeals plainly found that Petitioners had actual knowledge of collective activity as well. Pet. App. at 58a-59a, 64a-65a.

Keogh. Thus, the error that Petitioners identify—if error there is—was meaningless as a matter of fact, and already addressed and settled as a matter of law by this Court's recent decision in *Stanley*. This is certainly not the kind of issue, without either practical or legal effect, that this Court should consider as an appropriate basis for granting *certiorari*.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Pursuant to Supreme Court Rule 28.1, Respondents provide the following information:

1. Respondent CSX Corporation has the following non-wholly-owned subsidiaries and affiliates: Country Wide Transport Services, Inc.; Baronial Transportation Corporation; Akron and Barberton Belt Railroad Company (The); Akron Union Passenger Depot Company (The); Allegheny and Western Railway Company; Wesjax Development Company; Augusta and Summerville Railroad Company; Baltimore and Philadelphia Railroad Company (The); Beaver Street Tower Company; Belt Railway Company of Chicago; Central Florida Pipeline Corporation; Central Railroad Company of South Carolina (The); Central Transfer Railway and Storage Company; Chatham Terminal Company; Chicago and Western Indiana Railroad Company; Clearfield and Mahoning Railway Company; Cleveland Terminal & Valley Railroad Company (The); CSX Services, Inc.; Dayton and Michigan Railroad Company; Dayton and Union Railroad Company; Delaware and Bound Brook Railroad Company; First Georgia Development Corporation; Home Avenue Railroad Company (The); Lakefront Dock and Railroad Terminal Company (The); Monongahela Railway Company (The); Norfolk and Portsmouth Belt Line Railroad Company; North Charleston Terminal Company; Paducah & Illinois Railroad Company; Richmond-Washington Company; RF&P Corporation; Terminal Railroad Association of St. Louis; Trailer Train Company; Baltimore and Cumberland Valley Rail Road Extension Company (The); Winston-Salem Southbound Railway Company; Woodstock & Blocton Railway Company; Energy Dominion; Gemetal Distribution Services Company; Yukon Pacific Corporation; Green's Creek Joint Venture; High Island Offshore System; Norbritex Joint Venture; Poles Limited; Lanai Resort Partners;

James Center Development Company; Mid Allegheny Corporation; Staten Island-Cranford, Inc.; Glebe Road Associates; Glebe Road II Associates; Glebe Road III Associates; Glenway Associates; Richmond Center Associates; St. George Seaport Associates; and LightNet.

2. The Bessemer and Lake Erie Railroad Company is wholly-owned (except for directors' qualifying shares) by USX Corporation, with no subsidiaries of its own. Non-wholly-owned subsidiaries and affiliates of USX Corporation are: ACE Holdings, Ltd.; Adela Investment Company, S.A.; Altos Hornos de Vizcaya, S.A. (AHV); Associated Manganese Mines of South Africa, Ltd.; Associated Ore & Metal Corporation, Ltd.; Athione Prospecting & Development Corporation, Ltd.; Avateel SWA, Ltd.; Blue Grass Phosphate Company; Kapps Mining & Prospecting Co., Ltd.; La Pointe Iron Company; Navios Shipping Corp., Oresteel Investments (Proprietary), Ltd.; Prieska Copper Mines (Pty.) Ltd.; Société Des Mines De Fer De Guinée Pour L'Exploitation Des Monts Nimba (Mifergui Nimba); Tilden Iron Mining Company; The West Union Canal Company; U.S. Steel France; and Zuari Agro Chemicals Ltd.

3. Respondent Norfolk and Western Railway Company has the following non-wholly-owned subsidiaries: The Wabash Railroad Company and The Wheeling and Lake Erie Railway Company. Norfolk and Western is a wholly-owned subsidiary of Norfolk Southern Corporation. Norfolk Southern has the following non-wholly-owned subsidiary whose stock is publicly traded: Southern Railway Company. The Southern Railway Company has the following non-wholly-owned subsidiaries: High Point, Randleman, Asheboro and Southern Railroad Company; Mobile and Birmingham Railroad Company; The North Carolina Midland Railroad Company; The South Western Rail Road Company; State University Railroad Company; Yadkin Railroad Company.